

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

09/26/2002

CLERK OF THE COURT  
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza  
Deputy

LC 2002-000057

FILED: \_\_\_\_\_

STATE OF ARIZONA

CARRIE M COLE

v.

MICHAEL ROBERT MERANTI

JOHN R CALLAHAN

FINANCIAL SERVICES-CCC  
REMAND DESK CR-CCC  
SCOTTSDALE CITY COURT

MINUTE ENTRY

SCOTTSDALE CITY COURT

Cit. No. #1432644

Charge: 1. DUI ALCOHOL  
2. BAC .10 OR HIGHER W/IN 2 HRS OF DRIVING  
3. SPEED GREATER THAN REASONABLE  
4. FAIL TO DRIVE A SINGLE LANE

DOB: 12/09/58

DOC: 10/04/99

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

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This matter has been under advisement and this Court has considered and reviewed the record of the proceedings from the Scottsdale City Court, the Memoranda and arguments of counsel submitted.

Appellant, Michael Robert Meranti, was arrested by the Scottsdale Police and was charged on October 4, 1999 with: (1) Driving While Under the Influence of Intoxicating Liquor, a class 1 misdemeanor, in violation of A.R.S. Section 28-1381(A)(1); (2) Driving with a Blood Alcohol Concentration of .10 or Higher, a class 1 misdemeanor offense in violation of A.R.S. Section 28-1381(A)(2); (3) Speed Greater than Reasonable, a civil traffic matter in violation of A.R.S. Section 28-701(A); (4) Failure to Drive in a Single Lane, a civil traffic violation in violation A.R.S. Section 28-729.1. Appellant entered pleas of not guilty and his case proceeded to a jury trial on November 12, 2001. During that trial, Scottsdale Police Officer Katzaroff referred during his testimony to the fact that Appellant was arrested subsequent to his DUI charge for another charge (Failure to Appear). The trial judge granted a mistrial on motion of Appellant's counsel. Thereafter, Appellant's counsel filed a Motion to Dismiss, claiming that jeopardy had attached and a retrial would violate Appellant's rights. The trial judge (the Honorable James Blake) denied this motion on December 17, 2001.<sup>1</sup> Thereafter, Appellant's case proceeded to trial and he was convicted of the criminal charges and found responsible for the civil traffic violations. The only issues raised on appeal concern the trial judge's denial of Appellant's Motion to Dismiss.

The first issue raised by Appellant is his claim that the trial judge erred in failing to grant his Motion to Dismiss for the failure of Appellee to file a timely response to that motion. If Appellant is implying that the trial court must always grant a motion when the opposing party fails to file a

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<sup>1</sup> See R.T. of December 17, 2001, at pages 9-10.

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timely response, Appellant is mistaken. Rule 35.1(a) provides in pertinent part:

... Each party may within ten (10) days file and serve a response, and the moving party may within three additional days file and serve a reply, which shall be directed only to matters raised in a response. Responses and replies shall be in the form required for motion. If no response is filed, the motion shall be deemed submitted on the record before the court (emphasis added).

In this case the record before the court included the trial court's file, transcripts and/or recordings of the previous trial.

It does not appear that the trial judge erred in permitting Appellee to respond orally to Appellant's Motion to Dismiss. Rule 35.4, Arizona Rules of Criminal Procedure, provides:

Upon request of a party, or on its own initiative, the court may waive a requirement specified in this rule, or overlook a formal defect in a motion or request.

This provision supplements the inherent power of the court, upon motion of a party, or its own initiative, to waive the formal requirements of rules of procedure. This Court must conclude, then, that the trial judge did not err in permitting the State to respond to Appellant's Motion to Dismiss.

The second issue raised by Appellant is that the trial court erred in denying his Motion to Dismiss. Appellant contends that his constitutional right to be free of double jeopardy was violated, citing several federal cases. However,

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Appellant's federal constitutional right against double jeopardy is not applicable to this State proceeding.<sup>2</sup> The Arizona Constitution also contains a prohibition against double jeopardy in Article II, Section 10. The Arizona prohibition against double jeopardy differs in significant ways from its federal counterpart.<sup>3</sup> In Pool<sup>4</sup>, the Arizona Supreme Court explained those circumstances under which jeopardy attaches after a mistrial is granted:

In our view, therefore, the resolution of the question of when jeopardy attaches should turn upon the concept of enforcing the constitutional guarantee against double jeopardy when the right to be free from multiple trials, which that clause was meant guarantee, would be impaired by the prosecutor's intentional, improper conduct (citation omitted). We do not agree that standards could not be formulated to accomplish the objectives of the clause in situations such as this. We hold, therefore, that jeopardy attaches under Article II, Section 10 of the Arizona Constitution when a mistrial is granted on motion of Defendant or declared by the court under the following conditions.

1. Mistrial is granted because of improper conduct or actions by the prosecutors; and,
2. Such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety but, taken as a whole, amounts to intentional conduct which the prosecutor knows (footnote omitted) to be improper and prejudicial, in which he pursues

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<sup>2</sup> See Pool v. Superior Court, 139 Ariz. 98, 677 P.2d 261 (1984).

<sup>3</sup> Id., 139 Ariz. at 108, 677 P.2d at 271.

<sup>4</sup> Id.

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for any improper purpose with indifference  
to a significant resulting danger of  
mistrial or reversal; and,

3. The conduct causes prejudice to the  
Defendant which cannot be cured by means  
short of a mistrial.<sup>4</sup>

And, the Arizona Supreme Court explained the phrase "the  
prosecutor knows" in a footnote:

The trial judge is to measure what  
the prosecutor "intends" and "knows" by  
objective factors, which include the  
situation in which the prosecutor found  
himself, the evidence of actual knowledge  
and intent and any other facts that may  
give rise to an appropriate inference  
or conclusion. He may also consider  
the prosecutor's own explanations of his  
"knowledge" and "intent" to the extent  
that such explanation can be given credence  
in light of the minimum requirements expected  
of all lawyers.<sup>5</sup>

In this case, the trial judge made specific and detailed  
findings of fact which were based upon his review of the record:

The first time he (Officer Katzaroff)  
makes the statement, it's obvious he's  
blundering. He shouldn't have said that  
statement. I'm not sure why the State  
argued in its response that there shouldn't  
have been a mistrial. There should have  
been a mistrial.

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<sup>4</sup> Id., 139 Ariz. at 108-09, 677 P.2d at 271-72.

<sup>5</sup> Id., 139 Ariz. at 108, 677 P.2d at 271.

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The second time (Officer Katzaroff refers to Appellant's subsequent arrest for failure to appear) it's in response to the question (Appellant's counsel) asked, you said you were referring to some other person stopped that night. We now know that isn't what he said. What he said was, he was referring to the Defendant's stop another time. And then his answer is, in answer to that question, because that wasn't someone else stopped that night, it was the Defendant stopped later on.

Now, if he (Officer Kazaroff) had been a trained lawyer, it would have been better to ask for a recess at that point, because answering that question brings up the fact that, no, it wasn't someone else stopped that night, it was the Defendant stopped another night. It would have been better if he would have just said, no, that isn't what I said, because it isn't. ...

A mistrial was proper, but I don't see that this was an intentional act that so tainted it that the Defendant could not - - I mean, that double jeopardy applied so, therefore, I'm denying the Motion to Dismiss.<sup>6</sup>

Clearly, the trial judge concluded that the conduct which caused the mistrial was the result of legal negligence and inexperience on the part of the Scottsdale Police Officer who was not trained in the law. The trial judge further found that the conduct that caused the mistrial was not "intentional conduct" on the part of the prosecutor that was of a such a serious nature that double jeopardy should attach. The trial

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<sup>6</sup> R.T. of December 17, 2001, at pages 9-10.  
Docket Code 513

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judge properly measured the State's witness' intent and knowledge by appropriate objective factors, and the trial judge's conclusions were based upon inferences supported by the trial court record. This Court must conclude that the trial judge did not err in denying Appellant's Motion to Dismiss. As a matter of law, this Court concludes that the prosecution and its witness, Scottsdale Police Officer Katzoroff, did not intend to cause the mistrial.

IT IS THEREFORE ORDERED affirming the judgments of guilt and sentences, the findings of responsibility and sanctions imposed by the Scottsdale City Court.

IT IS FURTHER ORDERED remanding this matter back to the Scottsdale City Court for all further and future proceedings in this case.